IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 281.

THE CITY OF NEW ORLEANS, PETITIONER,

vs.

ANN WARNER ET AL., RESPONDENTS.

CERTIORARI TO CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

SUPPLEMENTARY BRIEF FOR RESPONDENTS.

FIRST. It would seem clear that the decree of the circuit court, so far as not appealed from, must stand.

The appeal is allowed generally "upon respondent," *i. e.*, the city, "furnishing a bond, conditioned according to law, in the sum of $5,000, with good and solvent security" (p. 149).

The bond given and required as a condition of appeal runs to certain persons named, and does not run to John J.

Donaldson or to Ann Warner, Joanna E. McCrossin, Mary E. Warner, and Harry Warner, the legal heirs of John G. Warner (p. 146, sub. third; and for bond see p. 152). Further, these persons are not named in the petition to this court for the writ of certiorari from this court (p. 80). Therefore the decree in favor of these parties cannot be disturbed.

SECOND. Petitioner claims that, as against certain claims presented before the master, he can raise and has raised certain points which he says he did not raise in the hearing resulting in the decree, and that such points are fatal to such claims.

In fact, petitioner has not raised such points now.

The two points on which he now relies are: 1. That the act of 1876, number 16, gave no authority to the city to settle claims or to do anything but purchase the dredge-boats, and that all warrants issued in excess of the appraised value of the dredge-boats, $153,750, are void. 2. That under the act appraisement is a condition precedent, and that no appraisement was had as to anything but the dredge-boats.

The record shows that no such points were made before the master or passed on by him.

The exceptions to the master's report are on page 108, and disclose the objection that the *advantages* of the *decree* extended only to warrants issued for property up to $153,750, and not to others.

In other words, the exception to the master's report raised a question of construction of *the decree* herein and raised no question of construction of act number 16.

Not a word is said as to authority of the council under the act to issue warrants for anything beyond the value of the boats, and not a word is said as to appraisement.

It seems that the master first made a report (pp. 102–106). To that report petitioner filed certain exceptions (p. 108). The master then filed a supplemental report (pp. 106–108), and to that petitioner filed further exceptions (pp. 143,144).

In these exceptions, as in the others, the point raised by petitioner is "that the *advantages* and the *decree* herein under which this reference is made extend only to such warrants as were used in payment of the property purchased."

Not a word as to lack of authority—not a word as to appraisement. The point, as before, was construction of the *decree*, not of the *statute*.

On those exceptions and on the testimony taken before the master (pp. 109 *et seq.*) the cause was heard by the circuit court and its decree was made (pp. 145 to 148).

From this decree an appeal by the city was allowed (p. 149) and an assignment of errors filed in the court of appeals, wherein for the first time lack of authority under the statute and lack of appraisement are assigned as error.

Now, if petitioner's claim, that the question of the authority of the city to contract beyond $153,750 was not passed upon or adjudged in this court on the prior certiorari, reported in 175 U. S., be sound, our claim surely is equally sound that the point was never taken before the master or before the circuit court and was never passed on by them, and hence could not be assigned for error in the circuit court of appeals, and could not have been passed upon or adjudged in that court and cannot now be entertained in this court.

For authorities see brief of Mr. De Gray, pp. 16 *et seq.*

THIRD. The rights of the holders of warrants for the sums exceeding $153,750 were directly adjudged in this court on the former certiorari, reported in 175 U. S. Reports.

The three warrants held by John G. Warner, and which this court adjudged should be paid, were of that very class and number, viz., those issued after more than $153,750 par value had been issued, and the direct judgment of this court, and of all the courts below acting on the mandate of this court, was that on those three warrants the city was indebted to Warner $6,000 and interest.

That the drainage assessment was a fund to pay those identical warrants and to pay other holders of the *same class of* warrants.

No difference between the warrants now objected to and the three of complainant specifically adjudged is alleged or suggested by petitioner, nor is it contended by petitioner that the decree in favor of complainant on his specific three warrants can now be in any way disturbed.

Indeed, in his brief on application for the writ herein counsel for the city says:

"That Warner's warrants are entitled to be paid out of the fund is now beyond question" (pp. 11, 12).

So that if his contention should now prevail, we would have this court in the very same case adjudging that the three Warner warrants are valid and must be paid out of the fund, and that a lot of other warrants of precisely the same kind held by others are invalid and cannot be paid out of the fund, and for a reason which applies with absolute precision to the Warner as much as to the other warrants.

Such a result would be, to say the least, funny.

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FOURTH. The City of New Orleans claims to escape from the direct adjudication of this court that holders of the same class of warrants must be paid, on the ground that claimants coming in under the decree are new parties, and that the question is a new question.

Neither is true.

This bill is filed against a fund in the hands of a trustee to charge the trustee with having the fund and to distribute it among its *cestui que trust.*

The difficulty of *parties* in such a case was in early days presented and the method of pleading in behalf of all others similarly situated was resorted to.

The "others similarly situated" were never regarded as strangers. They always had the advantage and benefit of the decree rendered. What was then decreed could never be relitigated as to them, neither on the same or new argument, and the only thing that can now be litigated by the city in respect to any of these warrants is: Are they the same class of warrants on which Warner recovered? If so, so far as the liability of the drainage fund to the holders is concerned, they must be paid, and the only defense permissible must be of a character different from any question of the original liability of the fund to pay that warrant, and because of something that has happened since.

The very authorities cited by the petitioner show this.

See 2d Danl. Ch. Pr., p. 1210, star paging.

The general language used is based on a decision that if a claim was barred by the statute of limitations before *decree* passed, it could not be proved.

This is very far from allowing the decree itself to be relitigated; but, such as it is, note A shows that it is not law, and that the *filing of the bill* is the date at which the statute must have run.

The filing of the bill in this case was therefore the commencing of a suit by every owner of a warrant. Such owner was a party to the suit, and all defenses applying generally to the class of warrants must be set up in the answer or they are barred.

In the thousands of cases of this kind none can be found where the defendant was allowed, as against one coming in under the decree, to relitigate as to such person questions which had been adjudged by the decree.

See also 1st Danl. Ch. Pr., pp. 239–241–243–245, 246, star paging.

See also *Ex parte* Jordan, 94 U. S., 252.

Suits of this kind relieve from the objection of want of parties and are intended so to do.

There could be no relief from that objection, were the contention of petitioner upheld.

Nashville R. R. *vs.* Orr, 18 Wallace, 471.

McArthur against Scott, 113 U. S., 340.

The cases as to the effect of prior adjudication, where the new suit was on a different cause of action, as in Cromwell against County of Sac, have no application.

This is not a new suit on a different cause of action or with different parties. It is not a new suit at all.

The claimant was a party from the commencement, and

has nothing to do but to prove himself the owner of such a warrant as is described in the decree.

FIFTH. As *res nova*, the warrants objected to are entitled to participate in the distribution of the fund.

The question is: What is the law of Louisiana as to the validity of these warrants?

As evidence that they are valid, we have—

1. The decision of this court as to precisely similar warrants, viz., the Warner warrants, adjudged to be good.

2. The decision of the circuit court of the United States and of the court of appeals in the suit brought by Wilder & Co. (See pp. 155 to 160, inclusive.)

The claim of Wilder & Co. before the master shows that the numbers of their warrants were 341 for $5,000 and 402 for $2,000, and the list of warrants put in evidence by petitioner (pp. 137, 138) shows that both warrants were preceded by warrants to the amount of $190,000.

It would seem as if the question might be considered as settled by authority.

But let us take the act.

The first section authorizes the city to transact and contract * * * for the purchase and settlement of all or any rights, franchises, and privileges created, authorized, or arising in favor of said company; also for the purchase of tools.

Now, what were the rights, etc., to be thus purchased and settled for?

They were those conferred by act 30 of 1871.

They had the right to do certain drainage work at certain prices, which the petitioner now claims were extravagant, and petitioner was bound to pay those prices (see section 8).

By section 6 they had the right to certain damages for failure on the part of the board of administrators to do in time the things by the act required of them.

These were rights under the act of 1871. That act, in other words, gave to the Ship Canal Co. the monopoly of doing certain necessary drainage work at very profitable prices.

These rights were part of those settled for and transferred by the Ship Canal Co. and its transferee to the city under act 16 of 1876.

The transfer was not alone of the franchise; that was the least part of it; it was of the monopoly of doing drainage work, and at the price fixed, and of all the rights which to that date had accrued in the doing of such work.

Construing act No. 16 in the light of rights given by and acquired under act No. 30 of 1871, it is clear that it was intended by act No. 16 of 1876 to give to the city power to settle so as to free itself from all obligation under act No. 30 of 1871.

The city of New Orleans so construed the act, for it took from the canal company and Van Norden an assignment of "the rights, title, interest, share, claims, demands, franchises, privileges, contracts, and advantages which the canal company has or may have under and by virtue of act 30 of 1871" (p. 37).

It took also a subrogation to all the "rights, action, and remedies to which the canal company or its transferee

might be entitled under act 30 of 1871, or any other act, and an authority to act the same as the canal company might have acted" (p. 38).

And the city signed a statement that the sale of the said "rights, title, interest, share, claim, demand, franchises, privileges, contracts, and advantages and the sale of the boats, etc., were for the sum of $300,000, payable in warrants" (pp, 38, 39).

Clearly the cotemporaneous construction of the statute by the city and by the canal company was that the statute authorized the full settlement of all claims under the statute No. 30 of 1871, and the city did settle them by buying them, as well as the boats, and paying for the whole a common consideration of $300,000.

This was in 1876.

From that time until the filing of the assignment of error in the circuit court of appeals in this year, 1900, notwithstanding all the active litigation with respect to these warrants, never a word of objection, according even to petitioner, has been raised against the validity of the construction given by all parties to the act No. 16 of 1876, given by every court which has considered it, and apparently given by petitioner's counsel themselves until their assignment of error for the circuit court of appeals.

Is it not rather late to urge a different construction now?

SIXTH. Petitioner, however, objects to the $20,000 of warrants issued, because of diversion by the city of funds derived from collection of assessments to the general fund.

The warrants so objected to are numbered in the list put in evidence by petitioner from 393 to 399, inclusive, and 402, and are for $2,000 each, making sixteen thousand dollars and eight warrants; two warrants, 400 and 401, have been paid (p. 139).

The whole amount of warrants of this kind included in the decree is but $16,000.

Of these one, number 399, is owned by John J. Donaldson, for $2,000 (pp. 132, 133); five, numbered 393, 394, 395, 396, and 397, are owned by Crossly & Son, $10,000 (p. 129); one, number 398, is owned by Mrs. Lytte, $2,000 (p. 131), and one, number 402, is owned by Wilder & Co., $2,000 (p. 130).

These warrants were not part of those, amounting to $300,000, mentioned in the bill of complaint and adjudged to be entitled to payment out of the drainage fund, but they are described in the notarial act annexed to and made part of the bill. The owners, however, intervened under the decree and presented them to the master, and no objection was made to their being presented and considered in this suit, and the question is, therefore, simply, Are they entitled to be paid from the fund?

That one of them is so entitled is beyond question. It is number 402, for $2,000, the last in the list furnished by the city (p. 139), and one of the two sued on by Wilder & Co. and described in the judgment obtained by them in the United States circuit court on the mandate of the United States circuit court of appeals (p. 158).

This judgment settled the principle that these warrants were entitled to be paid out of drainage assessments.

Neither the complainant nor any one coming in under the decree herein objects. The fund is large enough to pay all.

On what ground can the defendant object to a judgment that these warrants shall be paid from the fund when they were issued because of a diversion of that fund, and when but for the settlement by the issue of these warrants, in which way alone, by the provision of section 3 of act No. 16 of 1876, could any settlement be made, the city would have been directed to replace the money diverted?

The issue of the warrants was a settlement made by the notarial act before Le Gardeur (pp. 36 *et seq.*), pursuant to the authority of act No. 16 of 1876, because of a diversion of the drainage-assessment fund, and was found by the master in his supplemental report so to be (p. 107).

SEVENTH. As to the objection that the right, damages, etc., were not appraised, I need but to refer to Mr. De Gray's brief on that point (pp. 30 *et seq.*).

The court will note that by the act No. 16 the council was to provide for the appointment of appraisers, "whose duties and powers shall be specifically assigned in said ordinance."

That ordinance (p. 42) does in terms specifically direct the appraiser to appraise the boats, etc., and to "return a statement of all information in the possession of his office concerning damages claimed" by the ship canal company or its transferee.

Now these claims were against the city or the assessment fund of the city. The means provided for the payment of claims against the public must be assumed to be ample.

The *value* of such claims needs no appraisement. The value depends upon the responsibility of the bidder. The validity of the claim is another question.

As the claims were to be paid only in drainage warrants, and as the fund from which they were payable remained the same, any specific appraisement would be an idle form; the value must be appraised at par.

Their validity and the extent of their validity were for the council and not for the appraiser, and the council, when in full possession of the facts, had all the power and authority necessary or useful for a settlement.

EIGHTH. The judgment should be affirmed.

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